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Supreme Court, U.S.
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No. 98-8384

IN THE
Supreme Court of the United States

TERRY WILLIAMS
Petitioner,

v.

JOHN B. TAYLOR, Warden,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The Court directed the parties to address the following questions:

1. Where both the federal district court judge and state trial court judge who had originally sentenced Petitioner to death concluded that counsel's deficient performance was prejudicial under the test this Court articulated in *Strickland v. Washington*, whether the Fourth Circuit erred in denying relief by reformulating the *Strickland* test so that:
   a. ineffective assistance of counsel claims may be assessed under the "windfall" analysis articulated in *Lockhart v. Fretwell* even where trial counsel's error was no "windfall"; and
   b. the petitioner must show that absent counsel's deficient performance in the penalty phase, all twelve jurors would have voted for life imprisonment, even where state law would have mandated a life sentence if only one juror had voted for life imprisonment.
2. Whether the Fourth Circuit erred in concluding that, under 28 U.S.C. § 2254(d)(1), a state habeas court's decision to deny a federal constitutional claim cannot be "contrary to" clearly established Federal law as determined by the Court unless it is in "square conflict" with a decision of this Court that is "controlling as to law and fact."
3. Whether the Fourth Circuit erred in concluding that, under 28 U.S.C. § 2254(d)(1), a state habeas court's decision to deny a federal constitutional claim cannot involve "an unreasonable application of" clearly established Federal law as determined by the Court unless the state court's decision is predicated on an interpretation or application of relevant precedent that "reasonable jurists would *all* agree is unreasonable."

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JURISDICTION

The Court of Appeals' judgment was entered December 18, 1998. A timely rehearing petition was denied January 15, 1999. The petition for certiorari was filed March 5, 1999 and granted April 5, 1999. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, which provide in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Council for his defence," and that "[n]o . . . State [may] deprive any person of life . . . without due process of law." This case also involves 28 U.S.C. § 2254(d)(1), a provision of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

A. The Trial, Sentence and Direct Appeal

On November 3, 1985, Harris Stone was found dead in his bed with no sign of foul play; the medical examiner concluded that he died of blood alcohol poisoning. *Williams v. Commonwealth*, 360 S.E.2d 361, 363 (Va. 1987). Six months later, Terry Williams confessed he struck Stone with a gardening tool known as a mattock and took three dollars from Stone's wallet. *Id.* After an autopsy of Stone's remains, Williams was indicted for capital murder. *Id.*

Williams was represented at a jury trial by appointed counsel, E.L. Motley, a sole practitioner.[1] Motley served as lead counsel. A recent law school graduate, Robert Smitherman, was appointed to assist him one month before trial. (JA 159-60, 185, 237.)

After a two-day trial, Williams was found guilty of capital murder. (JA 382.) At the penalty phase, the Commonwealth relied on a single aggravating circumstance, future dangerousness, to support a death sentence. It adduced Williams' extensive criminal record and testimony by two mental health experts. (JA 25-108.)

Williams' counsel offered only the testimony of Williams' mother and two neighbors (one plucked from the court audience at the last minute) that Williams was a "nice boy," had never said a "bad word" in their presence, and was not a violent person. Counsel also played the recorded testimony of a psychiatrist who offered no expert opinion but said Williams told him he had removed bullets from a gun so as not to hurt anyone in a 1976 rob-

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[1] Motley received three state bar reprimands (including one the day Williams was sentenced to die) for failing to properly represent clients between 1982 and 1987, and was indefinitely suspended from the practice of law in September 1989. (JA 173-78, 550-62.)

bery and had been unfairly convicted of a crime in 1982. (JA 109-16, 119, 124, 127, 306.)

Counsel then argued to the jury that even if Williams were "worse than Charles Manson," the jury should show him mercy, although counsel could not give "any logic or great earth shattering, moving reason" to do so (JA 133, 137). The jury retired and quickly returned with a death sentence.

The Virginia Supreme Court affirmed the conviction and death sentence, *Williams v. Commonwealth*, 360 S.E.2d 361 (Va. 1987), and certiorari was denied, *Williams v. Virginia*, 484 U.S. 1020 (1988).

B. The State Circuit Court Proceedings

A habeas petition was filed in the Danville City Circuit Court in August 1988. (JA 382.) The court dismissed most of Williams' claims but conducted a hearing in June 1995 on the ineffective assistance of counsel claims. (JA 383-84.) It was undisputed at the hearing that Williams' counsel waited until about a week before trial to begin sentencing preparation and ignored the following mitigating evidence, either because counsel did not think to locate it or wrongly believed the law did not permit access to it. (JA 189-208, 247-49.)

At the hearing, records and testimony were introduced showing that Williams had a traumatic childhood but was able to function well in structured settings and establish positive relationships. He was the sixth of eleven children, and Williams' mother testified that she drank herself into a stupor almost daily while pregnant with him. (JA 319-21, 531-32.) Uncontroverted juvenile records showed that his parents were alcoholics who supplemented their meager income by selling bootleg whiskey. (JA 319-20, 531.) The records described the sordid conditions of Williams' home:

> Lula and Noah [the parents] were sitting on the front porch and were in such a drunken state, it was almost impossible for them to get up. They staggered into the house to where the children were asleep. Terry, age 1, and Noah Jr., age 3, were asleep on the sofa. There was an odor of alcohol on the breath of Noah Jr. . . . Oliver [Olivia] had just awakened and was very sick. She said she was hungry and had been drinking whiskey. Ohair was completely passed out and never could be awakened. He did not have on any clothes . . .
>
> The home was a complete wreck. . . . There were several places on the floor where some one had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. There was stuffed pickle scattered on the floor in the front bedroom.
>
> Noah and Lula were put in jail, each having five charges of neglect placed against them. The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey. When Dr. Harvey examined them, he found that they had all been drinking bootleg whiskey. They were all hungry and very happy to be given milk, even the baby [Terry] drank a pint of milk before stopping. Oliver [Olivia] said they had not had any food all day. Ohair was still so drunk he could not talk.

(JA 528-29.) Williams' parents were jailed for criminal neglect, and the children were placed in a foster home

where they were badly treated before being returned to their parents three years later. (JA 321, 529, 582-93.)

Even then, the "parents show[ed] no interest in . . . the children"; "the children are without food and proper clothes often," and "[t]here are many home problems." (JA 587.) The family was so poor that Williams' mother could not afford surgery to remove a tumor. (JA 531.)

At the habeas hearing, family members testified about the "awful" beatings and emotional abuse suffered by Williams from a father who would strip him naked, tie him to a bed post, and beat him with a belt across his body and face. The parents fought constantly—hard fist fights—that left Williams cowering "in the corner shaking, crying." The child was so terrified of his father that he often stayed away from home all night. (JA 322-34, 577-84.)

Trial counsel never informed the jury that Williams was of borderline intelligence, was placed in special education classes and did not advance beyond the sixth grade. (JA 594-95.) Evidence of Williams' head injuries, referenced fleetingly by his mother at the jury trial (JA 129), was never developed because counsel never looked at a psychologist's report in the juvenile records that mentioned these injuries and "the possibility of a serious emotional disturbance and/or organicity." (JA 208-09, 334-35, 524, 582.)

Counsel admitted that, had they known of Williams' mother's alcoholism, they would have told the court-appointed experts who would have ordered neurological tests for Fetal Alcohol Syndrome ("FAS"), a life-long condition with profound emotional consequences. (JA 197, 231, 286-87, 370-71.) The head of Georgetown University's Medical School Genetics Department in fact diagnosed Williams as having FAS. (JA 353-67.)

It was undisputed at the hearing that Bruce Elliott, a respected accountant, had offered to testify for Williams at trial. He came to know Williams through a prison ministry program, visited him regularly and retained close contact when Williams was out of jail. Elliott would have testified that Williams took pride in completing a carpentry training program and strived to overcome his disadvantaged past. (JA 563-66.)

Williams' wife and daughter were at trial but were not interviewed by counsel. They would have testified to Williams' loving relationship with his young daughter. (JA 207-08, 571-74.)

Correctional records showed that Williams consistently functioned well in a controlled environment. (JA 542-44, 594.) Two correctional officials submitted affidavits to Williams' good conduct while incarcerated, and one stated that his status as an "A custody" inmate meant that Williams was "considered least likely to act in a violent, dangerous, or provocative way." (JA 569, 588.) Williams received two commendations while incarcerated—on January 31, 1985 for his "mature behavior" and "good intentions" in returning a guard's wallet with its money and other contents intact (JA 590), and on November 27, 1984 citing his "concern . . . for others" in reporting information crucial to breaking up a drug ring (JA 601).

Trial counsel's investigation failed to ascertain that the very mental health experts who testified for the Commonwealth would have stated that Williams would not be a future danger in a controlled environment. (JA 232-33, 299-300.) One of these experts, Dr. Arthur Centor of Central State Hospital, was emphatic:

> [I]n a structured environment [Williams] would not be of future danger, he would not be hostile or violent or commit crimes, not likely to commit such acts of violence that he would be a danger to that society in a structured environment.

(JA 313-14.) Centor also described Williams as "quite unique" in this regard. (*Id.*)

Based on the omitted evidence, the same Danville Circuit Court judge who had initially believed a sentence of death "just" and "appropriate" (JA 154) concluded that counsel's unprofessional errors prejudiced Williams and violated his right to effective assistance of counsel. (JA 399-401.) Judge James Ingram found that counsel's failure to investigate, prepare and present mitigation evidence fell "below the range expected to reasonable, professional competent assistance of counsel." (JA 422-24.) "[W]ith so little favorable testimony in the way of mitigation and faced with much unfavorable evidence on the question of future dangerousness, this information could have been critical in the jury's decision as to Williams' punishment." (JA 401.) Judge Ingram accordingly recommended that a new sentencing hearing be granted. (JA 429.)

C. The Virginia Supreme Court

The Virginia Supreme Court rejected this recommendation, concluding that even if Williams' counsel was deficient in failing to present mitigation evidence, that omission was not prejudicial. It recognized "[t]here is no doubt there was such evidence." (JA 439.) But it believed that in the wake of *Lockhart v. Fretwell*, 506 U.S. 364 (1993), it should not resolve Williams' claim based on *Strickland v. Washington*, 466 U.S. 668 (1984)—that, but for the omitted mitigation evidence, there was a reasonable probability he would have received a different sentence—" 'without attention to whether the result was fundamentally unfair or unreliable.' " (JA 438.) Under *Fretwell*, the court reasoned, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." (JA 438-39.) On this understanding of what *Strickland* meant

after *Fretwell*, the Virginia court held that Williams' death sentence "was not fundamentally unfair or unreliable, and that the prisoner's assertions about the potential effects of the omitted proof do not establish a 'reasonable probability' that the result would have been different, nor any probability sufficient to undermine confidence in the outcome." (JA 441.) It denied all relief. (JA 444.)

D. The Federal District Court

Examining the state record in federal habeas, District Judge James Cacheris granted relief. "[G]iven the amount of mitigating evidence not presented to the jury, the compelling nature of such evidence, and the fact that none of such evidence was cumulative," he found that "there is a reasonable probability that had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted." (JA 473, 487.)

Judge Cacheris found that the Virginia Supreme Court erred in its application of *Strickland* and *Fretwell*. (JA 473.) The determinative inquiry was *Strickland*'s: whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. *Fretwell* applies only when an "outcome determinative" analysis would give the petitioner a "windfall." (JA 474-75.) Because "Williams is entitled, by current law, to have all possible mitigating evidence put before the sentencing jury," he sought no "windfall." (JA 475-76.)

E. The Fourth Circuit Court of Appeals

The Fourth Circuit reversed. It ruled that under 28 U.S.C. § 2254(d), unless a state court decision "is in 'square conflict' with Supreme Court precedent that is controlling as to law and fact"—legally and factually "indistinguishable in any material way" from the Su-

preme Court decision—" 'habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would *all* agree is unreasonable.' " (JA 497-98, quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) (emphasis added).) Because Williams' facts are not precisely identical to those of *Strickland* and *Fretwell*, the court asked solely whether the Virginia Supreme Court's conclusions were "unreasonable." Assuming "without deciding, that Williams' trial counsel were objectively unreasonable in failing to investigate, prepare, and present [the omitted] evidence in mitigation," the court declined to "say the Virginia Supreme Court's decision that Williams was not prejudiced thereby was an unreasonable application of the tests developed in either *Strickland* or [*Fretwell*]." (JA 501-02.)

The Fourth Circuit believed that *Fretwell*'s "emphasis on reliability and a fair trial simply clarified the meaning of prejudice under *Strickland*." (JA 506-07.) Concurring with the Virginia Supreme Court that the aggravating evidence was "simply overwhelming" and that a "significant portion of the omitted mitigation evidence also painted Williams as a recidivist who was likely to commit future offenses," the court found that "the Virginia Supreme Court's conclusion that there was not 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.' . . . was not unreasonable." (JA 505-06.) It criticized the District Court's conclusion that "there was a reasonable probability that at least one juror would have concluded that the death penalty was not warranted had the evidence in question been presented." Because "[t]he *Strickland* prejudice standard assumes twelve reasonable, conscientious and impartial jurors," a determination "that one hypothetical juror might be swayed by a particular piece of evidence is insufficient to establish prejudice." (JA 504-05.)

SUMMARY OF ARGUMENT

In *Strickland v. Washington*, the Court formulated Sixth Amendment rules to guide courts in resolving a wide range of claims of ineffective assistance of counsel. The prejudice prong of those rules says that a conviction or sentence must be set aside upon the demonstration of a reasonable probability that it would not have been rendered but for the defective performance of trial counsel. Williams' death sentence meets this standard. His lawyers' belated, perfunctory investigation of their client's background not only failed to uncover a wealth of persuasive mitigating evidence but left the state's sentencing case immune from adversary testing.

The appellate courts below were wrong in thinking that *Lockhart v. Fretwell* changes the rules set down in *Strickland* to permit the disallowance of relief in Williams' circumstances as a "windfall." *Fretwell*'s "windfall" principle holds that a claim of ineffective assistance of counsel cannot be founded on the failure of a defense lawyer to use untenable contentions or improper means to secure a victory to which the defendant is not entitled under the applicable rules of law. Neither Virginia law nor constitutional law disentitled Williams to refute the prosecution's case and present a countervailing case based on available, credible factual evidence at his capital sentencing trial. To the contrary, this was the process that every applicable rule of law *required*. The Fourth Circuit was also wrong in faulting the District Court for considering the reasonable likelihood that one juror would have been persuaded to vote against death. Under Virginia law, one juror's vote can preclude a death sentence.

The Court of Appeals erred, finally, in concluding that 28 U.S.C. § 2254(d)(1) required it to leave standing a death sentence based upon a state-court decision which, while contrary to the rules set down in *Strickland*, was not one that *all* reasonable jurists would agree was *un-*

reasonable by those rules. Section 2254(d) distinguishes between cases that are governed by a rule of decision set down by this Court and cases that are not. It instructs a federal habeas court to accept state-court decisions in the latter cases unless the result would be an "unreasonable application" of preexisting constitutional-law principles. But in cases like Williams' where a constitutional rule had been made by this Court to govern the exact issue presented to the state court, a state-court decision "contrary to" that rule in the considered judgment of a federal habeas court is subject to correction under § 2254(d). This is the most straightforward reading of the statute and the one compelled by every canon of statutory construction.

ARGUMENT

In Part I below we show that the clearly enunciated standards of *Strickland are* dispositive of this case. In Part II we show that nothing in *Fretwell* changes this conclusion and that the reasoning by which the appellate courts below denied Williams relief under *Strickland* is untenable. In Part III we show that § 2254(d), as amended by AEDPA, also does not forbid a federal habeas court to give Williams the relief to which he is entitled under the Sixth Amendment rules plainly declared in *Strickland*.

I. COUNSEL'S FAILURE COMPETENTLY TO INVESTIGATE AND PRESENT MITIGATION EVIDENCE PREJUDICED WILLIAMS, DENYING HIM EFFECTIVE ASSISTANCE

A. The Well-Settled Test of *Strickland v. Washington* Defines The Right to Effective Assistance

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court finally resolved the question that had plagued the lower courts since *Gideon v. Wainwright*, 372 U.S. 335 (1963): how to determine when trial counsel's performance constitutes ineffective assistance. Guided by the

purpose of the Sixth Amendment "to ensure a fair trial," the Court articulated a rigorous two-prong test for deciding "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

First, the defendant must show deficient performance falling "below an objective standard of reasonableness." *Id.* at 680. While "[j]udicial scrutiny of counsel's performance must be highly deferential," the "court should keep in mind that counsel's function . . . is to make the adversarial testing process work in the particular case." *Id.* at 689-90. Thus, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691.

Second, because "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding," any "deficiencies in counsel's performance must be prejudicial to the defense." *Id.* at 691-92. Recognizing that "[a]ttorney errors come in an infinite variety" that generally "cannot be classified according to likelihood of causing prejudice," the Court articulated as "the appropriate test for prejudice," whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 693-94. Putting aside "the luck of a lawless decisionmaker" or a lawless decision, "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 695-96.

Under this test, only one conclusion can be reached here: Terry Williams' counsel were grossly deficient and, but for that deficiency, there is a reasonable probability that he would not have been sentenced to die.

B. Application of the *Strickland* Test Requires Invalidation of Williams' Death Sentence

It is clear, and no court reviewing this record has found otherwise, that Williams' lawyers neither undertook a minimally capable investigation nor made informed professional judgments to forego one. Incompetence, not strategy, explains why counsel failed to conduct even a rudimentary investigation that would have revealed available, admissible, compelling mitigation evidence.[2] The record fully supports the conclusions of the two experienced trial judges in the case that counsel's performance was unreasonable under prevailing professional norms. Even the Virginia Supreme Court conceded "[t]here is no doubt there was such [mitigation] evidence; the facts are not in dispute." (JA 439-40.) The only question for the Virginia Supreme Court, and for the Fourth Circuit, was "whether this *deficient* performance constitutes 'prejudice' within the meaning of that term." (JA 440 (emphasis added); *see* JA 501-02.)

Strickland devised its standard for prejudice in resolving the self-same issue that Williams' case presents: the appropriate analysis of "prejudice" to be used to evaluate a claim that trial counsel was ineffective in failing to make an adequate investigation and presentation of mitigation evidence in a capital sentencing trial. Applying this standard, both trial judges who reviewed the powerful mitiga-

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[2] Williams' counsel did not begin to think about the penalty phase, even in general terms, until about one week before trial, and then just "shotgunned" his inquiries. (JA 207, 227.) The absence of a timely, thorough investigation doomed any development of mitigating evidence. Counsel admitted that he did not even seek to obtain the crucial youth and juvenile records because he mistakenly believed that state law barred access to them (JA 194-95), an omission that "betray[ed] a startling ignorance of the law." *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Counsel's admission that he would have presented these records to the jury had he been aware of them (JA 195-96) belies any suggestion that his conduct was the product of informed choice or strategy to which deference might be due.

tion evidence described above correctly concluded that there was a reasonable probability that the outcome of the sentencing hearing would have been different but for counsel's unprofessional errors. Any other conclusion blinks reality.

The jury that sentenced Williams to die was completely ignorant of his deeply troubled upbringing; it never knew he was the product of wretched poverty and crippling neglect and abuse. Because of counsel's stunning default with respect to this classic area of mitigation, the jury was deprived of powerful evidence that would have made Williams understandable as a human being and provided a basis for affording him compassion. *See, e.g., Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982).

The unobtained prison records and testimony of prison guards would have documented Williams' nonviolence in a controlled environment and his capacity to "lead a useful life behind bars if sentenced to life imprisonment." *Skipper v. South Carolina,* 476 U.S. 1, 2, 7 (1986). This evidence would also have undermined the contentions of the prosecutor during closing argument that Williams' random, unrealized thoughts, expressed to a detective after Williams' arrest, that he had urges to choke other prisoners established a propensity for violence in prison. (JA 146.) Irrefutable prison records and the testimony of disinterested correctional officers would naturally carry weight with a jury.

The admissions of the Commonwealth's own expert witnesses, on whose testimony the prosecutor relied heavily during closing arguments (JA 146-48), would also have been persuasive in refuting its contention of future dangerousness. Dr. Miller Ryans and Dr. Arthur Centor would have testified that Williams would *not* be a future danger in prison; Dr. Centor concluded that Williams was "quite unique" in this regard. (JA 299-300, 314.) An adequate investigation would have permitted Williams'

counsel to establish out of the mouths of the Commonwealth's chosen mental health experts that Williams was not dangerous in a controlled environment, and—by undercutting the core of the prosecution's case for death—would have given the jury ample reason to reject a death sentence.

The evidence of Williams' partly succesful efforts at self-betterment and ability to establish positive relationships complements his record of responsible life in a custodial environment. Williams' wife and daughter would have shown that he was a loving father. (JA 571-75.) Testimony by accountant Bruce Elliott that Williams worked hard to overcome the handicaps of his congenital and childhood heritage and took pride in graduating from a job training program would have illuminated facets of Williams' character unknown to the jury. (JA 563-66.) Such "testimony from a well-educated professional would have had an impact on the jury on the question of future dangerousness, and could have tilted a juror to favor a life sentence." (JA 400.)

And the evidence that Williams' borderline intelligence could have resulted from head injuries or prenatal alcohol exposure exemplifies the sort of "compassionate or mitigating factors stemming from the diverse frailties of humankind" that jurors find compelling. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

The Virginia Supreme Court belittled this powerful mitigation evidence by characterizing it as showing only that "numerous persons, mostly relatives, thought that defendant was non-violent and could cope very well in a structured environment." (JA 443.) This is a manifestly wrong characterization. Far from centering on people's "thought[s]," the evidence which counsel neglected showed the indisputable *facts* of a troubled upbringing, *specific* intellectual deficits, and documented *behavior* in-

cluding an exemplary *record* of nonviolence in the structured environment of prison. The vast bulk of this neglected evidence was drawn not from "relatives" but from public agency records maintained by public servants who had no incentive to embellish; the Commonwealth's own correctional officers and mental health experts; and Bruce Elliott, a respected professional. The quality of this evidence was not lost on two experienced trial judges, familiar with juries, who found that it would likely have been persuasive against a death sentence.

The Virginia Supreme Court and the Fourth Circuit were equally incorrect in treating Terry Williams' criminal record as comparable to that of the habeas petitioner in *Strickland* so that, on its facts, *Strickland* could be cited as establishing that the series of crimes committed by Williams was "simply overwhelming" evidence of his future dangerousness. (JA 505.) In *Strickland*, the three murders committed in ten days were found to be heinous, atrocious and cruel; they were accompanied by torture and kidnapings and were committed to avoid arrest and to hinder law enforcement. 466 U.S. at 672-74. In contrast to these multiple aggravating factors, the Commonwealth's case for death against Williams was limited to the aggravator of future dangerousness; the prosecution never even contended that Williams' "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Va. Code Ann. 19.2-264.4(C). To be sure, Williams had committed crimes of violence on the streets; but the key to the Commonwealth's theory for death was Williams' future dangerousness *in confinement*; and on that issue, the evidence of Williams' prospects was sufficiently "unique" (JA 314) to convince the Commonwealth's own expert witnesses that he was no such danger.

II. THE VIRGINIA SUPREME COURT AND THE FOURTH CIRCUIT EVISCERATED *STRICKLAND'S* PREJUDICE TEST IN DENYING RELIEF

A. The Virginia Court, with the Fourth Circuit's Approval, Erred in Applying *Fretwell* to Diminish Williams' Rights under *Strickland*

Relying on *Lockhart v. Fretwell*, the Virginia Supreme Court rejected Williams' straightforward attempt to satisfy *Strickland*'s prejudice prong by showing exactly what *Strickland* requires: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Virginia court reasoned that in light of *Fretwell*, *Strickland* could no longer be read as calling for a determination of prejudice based solely on the reasonable probability of a different *outcome*. (JA 438-39.) Rather, *Fretwell* teaches that "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.' " (*Id.*)

The Fourth Circuit found no cause to disagree with this aspect of the Virginia court's analysis because it concluded that *Fretwell*'s "requirement that a criminal defendant show that the result of the proceeding was unfair or unreliable was the rule, not the exception" in administering *Strickland*'s prejudice standard: "Thus, [*Fretwell*]'s emphasis on reliability and a fair trial simply clarified the meaning of prejudice under *Strickland*." (JA 506-07.) The Fourth Circuit read the *Fretwell* majority as rejecting Justice O'Connor's concurring view that "would limit the prejudice analysis contained in [*Fretwell*] to the 'unusual' case." (JA 506.)

Contrary to these readings of *Fretwell*, that decision neither glossed *Strickland*'s general test for prejudice nor superseded it in the specific circumstances of Terry Wil-

liams' case. *Strickland*'s test—"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (466 U.S. at 694)—was explicitly designed to apply in a variety of factual settings. And there can be no question that it governs the specific issue raised by Williams' case, because *Strickland* announced the test in just that kind of case: a case concerned with the claim that trial counsel was constitutionally ineffective in failing to make an adequate investigation and presentation of mitigation evidence in a capital sentencing trial. Williams' claim being the very one at issue in *Strickland*, it should be adjudicated by conducting the prejudice analysis *Strickland* dictates. Nothing more is needed, and nothing else is suggested by *Fretwell*.

In *Fretwell*, the issue was whether the failure of Fretwell's lawyer to make an objection which would have been legally sustainable at the time of trial but was no longer so at the time when Fretwell's ineffective-assistance claim reached federal habeas—because the basis for the objection was no longer good law—met *Strickland's* test for prejudice. The *Fretwell* Court concluded that, since the heart of a "prejudice" claim is an allegation that counsel's error did something " 'to deprive the defendant of a fair trial, a trial whose result is reliable' " if "the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him," then "[u]nreliability or unfairness does not result." 506 U.S. at 369-72 (relying on *Nix v. Whiteside*, 475 U.S. 157, 186-187 (1986) (Blackmun, J., concurring) (where petitioner "claim[ed] a right the law simply does not recognize," he was "deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial")). Hence, an outcome-determinative test serves no purpose and would "grant the defendant a windfall to which the law does not entitle him."

Id. at 370.[3] *Nix*, of course, was a case rejecting a defendant's claim that his counsel was ineffective for refusing to present perjured testimony.[4] So Justice O'Connor, harkening back to *Strickland* in her *Fretwell* concurrence, could aptly observe that "the impact of advocating a decidedly incorrect point of law, like the influence of perjured testimony, is not a proper consideration when assessing 'the likelihood of a result more favorable to the defendant.' " *Id.* at 375.

The key, then, to distinguishing the spheres of *Strickland* and of *Fretwell* is to determine whether a lawyer's errors deprived the defendant of a "substantive or procedural right *to which the law entitles him.*" *Id.* at 372 (emphasis added). If it did not—if the asserted ineffectiveness consists only in failing to advance legally unsustainable contentions or resort to legally impermissible tactics—then there is no legally cognizable prejudice, only a "windfall." But if it did, there can be no question of

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[3] In virtually all ineffective-assistance cases, the relief that will follow from a judicial decision that the defendant's Sixth Amendment right to counsel has been violated is a new trial (or a new sentencing proceeding or new appeal), not absolution from reprosecution. In the ordinary *Strickland* situation, this relief is sensible and administrable. Because there is a "reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different," the defendant obtains a new proceeding with a competent lawyer who can do the things that may produce a different outcome. But this makes no sense in a case such as *Fretwell* or *Nix* in which the claimed error was a failure to resort to a "substantive or procedural right" to which the defendant was not entitled. *Fretwell*, 506 U.S. at 372. In those situations, a new proceeding cannot produce a more favorable outcome *unless*, absurdly, the defendant is given the bonus of having his case adjudicated under either false facts (in *Nix*) or false law (in *Fretwell*). This is what inspired *Fretwell's* "windfall" metaphor.

[4] Because the defendant had no lawful right to present perjured testimony, the Court concluded that he had "no valid claim that confidence in the result of his trial ha[d] been diminished" by the jurors' reaching a verdict based on the truth, not the lies he wanted to offer them. 475 U.S. at 175.

a "windfall," and *Strickland*'s outcome-determinative analysis, standing alone, achieves "the proper functioning of the adversarial process" and a "just result." 466 U.S. at 686. With those goals achieved, the inquiry is over.

To require some *additional* showing couched in terms of "fundamental fairness" and "reliability" takes *Strickland*'s clear, albeit demanding, test and adds an additional prong with no readily definable content. There can be no dispute that fundamental fairness and reliability are the *goals* in testing the effectiveness of counsel. But these general goals provide "no workable principle," *id.* at 693, unless they are reduced to an administrable standard. *Strickland* undertook to fashion such a standard with its reasonable-probability-of-a-different-result test. To top this with a second-layer judgment about "fundamental fairness" and "reliability" would convert *Strickland*'s measured formula for prejudice into an impressionistic, value-laden "hunch test" which will be administered inconsistently and can only prove unworkable.

Moreover, the lower appellate courts' insistence that *Fretwell* provides a universally applicable formula for prejudice is at odds with this Court's recognition of a calibrated set of standards for prejudice, fitted to different circumstances. At one end of the spectrum, there are circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," such as the "actual or constructive denial of the assistance of counsel altogether." *United States v. Cronic*, 466 U.S. 648, 692 (1984). At the opposite end are cases like *Fretwell* and *Nix*, where counsel's conduct in failing to resort to claims or maneuvers that are legally foreclosed *cannot*—in fact or in law—prejudice the accused. And in the middle are those cases in which the defendant seeks neither the automatic relief that a *Cronic*-type violation would justify nor the windfall that *Fretwell* and *Nix* decry. For such cases, *Strickland* crafted and

continues to supply as clear and objective a standard as their multifarious nature allows: whether there is a "reasonable probability [of a different] outcome." Each of these approaches is designed to address a different category of prototypical situations; each has been found workable; there is no cause to do what the courts below have done here: blur the Court's plain distinctions and concoct a fungible, all-purpose, all-weather—but, ultimately, meaningless—test.

Beyond the Virginia Supreme Court's incorrect interpretation of *Fretwell* as a gloss on *Strickland*, that court also erred in classifying Williams' case as one in which a "windfall" would result if relief were granted. Such a view of this case reflects either of two indefensible assumptions: that Williams had no right to submit the neglected mitigation evidence to his sentencing jury, or that a life sentence for Williams would be an unacceptable ("windfall") outcome.

As for the first alternative, the District Court observed:

> Williams is entitled, by current law, to have all possible mitigating evidence put before the sentencing jury. . . . [U]nlike [*Fretwell*], . . . introduc[ing] mitigating evidence was a right the law *does* recognize.

(JA 475-76.) Indeed, that right is a "constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). A contrary conclusion by the Virginia Supreme Court would defy the Constitution.

If the Virginia court did not mean to do this, its reference to a "windfall" could only mean that it believed that a jury's favorable consideration of the omitted mitigation evidence would have resulted in a life sentence of which Williams was undeserving. Such a judgment, however, twists *Fretwell*'s conception of a "windfall" beyond recognition. Rather than consisting of a benefit obtained by

a defendant through a procedure to which he has no legal entitlement, a "windfall" would become any sentencing determination with which a court considering a Sixth Amendment claim disagrees. *Fretwell* gives no comfort to that notion. Virginia law entitled Williams to a jury's verdict on the issue of life or death; the Sixth Amendment entitled him to competent representation in trying the issue to a jury; and to grant him both those things—enjoyed by every other capital defendant in Virginia—is no "windfall."

B. The Fourth Circuit Wrongly Faulted the District Court's Reference to the Effects of Counsel's Deficiency upon Any One Juror in Assessing Prejudice under *Strickland*

The Fourth Circuit further distorted *Strickland* by reading it to require—without regard to a State's particular capital sentencing procedure—that a showing of prejudice include a demonstration of the requisite likelihood that all "twelve reasonable, conscientious and impartial jurors" (JA 505) would have voted for a life sentence. Virginia's capital sentencing law provides that "[i]n the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life." Va. Code Ann. § 19.2-264.4(E). Although the Virginia legislature could have constructed its sentencing scheme in some other way, it chose to allow one juror to "hold out" and prevent a sentence of death. Respect for this deliberate choice logically requires a federal court applying *Strickland*'s reasonable-probability standard to consider what might plausibly sway *one* reasonable juror's vote, not all twelve. Thus, the District Court was right in finding prejudice based on its conclusion that "there is a reasonable probability that had the jury heard [the omitted mitigation] evidence at least one juror and perhaps all, would have concluded that the death penalty was not warranted." (JA 473.)

The District Court's analysis is compelling in the death-penalty context where, as here, a State allows one juror's vote against death to spare the defendant's life. In *Adams v. Texas*, 488 U.S. 38 (1980), this Court recognized that individual jurors will perforce bring somewhat different standards for judgment to the penalty decision in a capital trial; capital sentencing is "not an exact science, and the jurors . . . unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." *Id.* at 46. Such variability from juror to juror was not only accepted in *Adams* but was the bedrock of the Court's holding there. It was also the bedrock assumption underlying the holdings in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), that capital sentencing jurors could not be forbidden to consider evidence that they believed *non-unanimously* to be mitigating. This whole body of constitutional law would be senseless if individual jurors were expected or required to be think-alikes. The realistic factual recognition that they are *not* all think-alikes, together with the Virginia legislature's authoritative legal determination that one vote for life requires a life sentence, fully supports Judge Cacheris' finding that Williams suffered cognizable prejudice under *Strickland* because there was a reasonable probability that at least one juror would have been swayed to vote for life by the neglected mitigating evidence.[5]

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[5] The Fourth Circuit faulted this finding because it thought that *Strickland's* observation "that a finding of prejudice does not 'depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency'" made it improper to consider that "one hypothetical juror might be swayed by a particular piece of evidence" which would not sway all twelve. (JA 505.) But Williams' claim is not that he is entitled to the benefit of some one juror's "*unusual* propensities toward . . . leniency." It is that he is entitled to the range of *usual* variation that *Adams*, *Mills*, *McKoy* and common experience recognize to exist among reasonable, conscientious and impartial jurors.

III. SECTION 2254(d) AFFORDS WILLIAMS RELIEF BECAUSE THE VIRGINIA SUPREME COURT DECISION WAS CONTRARY TO AND AN UNREASONABLE APPLICATION OF THE CLEARLY ESTABLISHED FEDERAL LAW OF *STRICKLAND*

The preceding Parts have shown that the Virginia Supreme Court's decision rejecting Williams' Sixth Amendment claim is irreconcilable with the law of *Strickland*. The remaining question is whether 28 U.S.C. § 2254(d) requires a federal habeas court to let such a decision stand. Section 2254(d)—which we examine in detail below—essentially limits habeas relief to cases in which a state court's decision of a federal claim is "contrary to," or involved an "unreasonable application of," this Court's preexisting, clearly established law. The Fourth Circuit below reduced the "contrary to" clause to a cipher (limiting it to the empty category of cases where a state court fails to follow a decision of this Court rendered *on identical facts*) and turned the "unreasonable application" clause into a rubber stamp (restricting review to the question whether *all* reasonable jurists would agree that the state court's decision is unreasonable). Under this construction, an Article III court, exercising statutory jurisdiction to review a federal constitutional decision by a state court, is obliged to give that decision legal effect although it concludes that the decision violated authoritatively established federal law.

Section 2254(d) cannot plausibly be read in such a constitutionally suspect way. As a matter of plain English and the accepted meaning of familiar legal terms, the Virginia court's decision was "contrary to" and involved an "unreasonable application of" the law of *Strickland*. Below we outline AEDPA's modifications of the habeas statute against the background of prior law, document the reading of § 2254(d) that every relevant canon of construction requires, and show how the Fourth Circuit's

contrary reading offends those canons and denies Williams the relief § 2254(d) expressly affords him.

A. AEDPA's Text and Context Reveal that Congress Intended § 2254(d) to Perfect the Court's Approach to Habeas Reform in *Teague v. Lane*

1. *AEDPA's Habeas Amendments*

AEDPA does not alter the jurisdictional requirement that "a district court shall entertain an application for a writ of habeas corpus . . . on the ground that [a state prisoner] is in custody in violation of the Constitution," 28 U.S.C. § 2254(a), but only the procedure for discharging that duty. *See Felker v. Turpin*, 518 U.S. 651, 658-62 (1996). Nor, as this Court has made plain, does AEDPA curtail the writ at every turn.[6] Instead, it gives prisoners one full chance to "receive an adjudication of [their] claim[s]," and—to avoid the "far-reaching and seemingly perverse" result of frustrating this—it builds on preexisting habeas doctrine. *Stewart*, 118 S.Ct. at 1622.

AEDPA does greatly *speed up* and *pare down* the habeas process. Habeas formely "provide[d] a remedy . . . without limit of time." *United States v. Smith*, 331 U.S. 469, 475 (1947). AEDPA puts a one-year limit on filing habeas petitions and for qualifying capital cases cuts the period in half and sets strict deadlines for court rulings. 28 U.S.C. §§ 2244(d), 2263, 2266. Until 1996, a ruling on habeas "was not res judicata." *Sanders v. United States*, 373 U.S. 1, 7 (1963). AEDPA bans relitigation of all claims previously denied on habeas, and adopts a "modified res judicata" rule barring new claims in a successive petition unless they are newly discovered *and* backed by clear and convincing evidence that the prisoner would have been found innocent but for the vio-

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[6] *See Hohn v. United States*, 118 S.Ct. 1969, 1777-78 (1998); *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618, 1621-22 (1998); *Lindh v. Murphy*, 521 U.S. 320 (1997); *Felker*, 518 U.S. at 658-62.

lation. § 2244(b); *Felker*, 518 U.S. at 657. Federal evidentiary hearings used to be available if a prisoner showed *either* "cause and prejudice" for not obtaining a state hearing *or* probable innocence. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 12 (1992). AEDPA forbids hearings unless a prisoner proves *both* cause (narrowly defined) *and* a *clear and convincing* case of innocence. § 2254(e)(2). Habeas appeals used to be available for *all* claims in a petition if any *one* claim was colorable. *Barefoot v. Estelle*, 463 U.S. 880, 893-94 (1983). AEDPA bars appeals absent "a substantial showing of the denial of a constitutional right" on each "*specific* issue." § 2253(b) (emphasis added).

AEDPA also amends § 2254(d), to provide that habeas

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

These terms undoubtedly alter prior habeas practice. In identifying the specific changes they make, the "task" is "to construe the statute that Congress has enacted," *Wright v. West*, 505 U.S. 277, 295 n.4 (1992), "giving the 'words used' their 'ordinary meaning,'" *Moskal v. United States*, 498 U.S. 103, 108 (1990), recognizing that "the law uses familiar legal expressions in their familiar legal sense," *Henry v. United States*, 251 U.S. 393, 395 (1920), and declining to read the act to "work[] a change in the underlying substantive law 'unless an intent to make such [a] chang[e] is clearly expressed,'" *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993). Reading § 2254(d) this way (as we do below) leads to these conclusions:

Section 2254(d)(1) divides state-court "decisions" into two categories defined by the decisions' relationship to "clearly established Federal law, as determined by the Supreme Court." It then prescribes a mode of review for each category. In the *first* category are decisions on claims for which there was "clearly established [Supreme Court] law" when the state court acted, to which its decision could be "contrary"—*i.e.*, claims as to which the Court had prescribed a rule designed for the specific purpose of evaluating that claim. When there was "clearly established Supreme Court law" binding the state court at the time it acted, a federal habeas court asks whether the state "decision was contrary to [that] law." "Contrary to law" review is a familiar legal term for plenary review of another court's legal and "mixed legal and factual decisions" under the prevailing rules of law.

In the *second* category are decisions on claims for which Supreme Court law had *not* designed a rule when the state court acted—claims as to which the law so far laid down by the Court did not control the claim but provided only "givens" from which an applicable rule had to be derived. When the state court was thus required to apply relevant but noncontrolling Supreme Court law and derive its own rule, § 2254(d) tells a federal court to ask whether the state "decision . . . involved an unreasonable application of [that] law." "Unreasonable application" is a legal term taken directly from the Court's *Teague v. Lane*, 489 U.S. 288 (1989) cases, describing a standard of objective reasonableness that is used to review a rule derived by a state court in the absence of a governing federal rule. Indeed, as we show below, § 2254(d)'s plain words and familiar legal terms are deftly designed, as a whole, to perfect and codify the *Teague* rule. We next survey that rule and other law forming § 2254(d)'s backdrop.

2. *The Underlying Substantive Law*

Before 1996, habeas law was stranded between two views of the writ, one giving no shrift to state decisions and licensing federal judges to overturn state convictions based on law created after they were final, another making the state decision dispositive unless proved erroneous and forbidding federal courts to blind-side state judges with new rules of federal law. Regarding the credit due state decisions, pre-AEDPA law regarded federal habeas as "an original civil proceeding, independent of the normal channels of review." *Townsend v. Sain*, 372 U.S. 293, 311-12 (1963). This allowed "relitigation" of prisoners' claims *from scratch*, and obliged federal courts to treat the state decision as merely "the conclusion of a court of last resort of another jurisdiction." *Brown v. Allen*, 344 U.S. 443, 458 (1953). Though this approach survived until 1996 as to state courts' *legal* and *mixed* decisions of federal law,[7] cases like *Sumner v. Mata*, 446 U.S. 539 (1981), *Keeney*, *supra*, and *Coleman v. Thompson*, 501 U.S. 722 (1991), rejected it as to state-court factfindings, hearings and state-law grounds of decision, which were treated as dispositive unless shown to be flawed.

As for the choice of law on habeas, until 1989, habeas courts routinely released prisoners on legal grounds developed after the state courts had upheld their convictions.[8] *Teague* partly curbed this practice, on the core principle that " 'the threat of habeas serves as a necessary additional incentive for [state] courts throughout the land to conduct their proceedings in a manner consistent with

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[7] *See Wright*, 505 U.S. at 295 ("reconsidered de novo"); *Stone v. Powell*, 428 U.S. 465, 477 (1976) ("full reconsideration").

[8] *See Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982) ("State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during [habeas], new constitutional commands.").

established constitutional standards,' " so that habeas courts " 'need only apply the constitutional standards that prevailed at the time the original proceedings took place.' " *Id.* at 306-07. Under *Teague*, if a prisoner's claim invoked a rule of law that the federal courts had designed for that kind of claim before the state courts ruled, a federal court independently reviewed the claim under that law. *See* note 9 *infra*. But if a claim depended on a rule that had *not* been prescribed for that claim when the state courts acted, it could not prevail unless, " '[s]urveying the legal landscape as it then existed,' . . . a state court considering [the] claim . . . 'would have felt compelled by existing precedent to conclude that the rule . . . was required by' " existing law. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

Most rules in the latter category were not wholly new, but existing rules the prisoner wanted "applied in a *novel* setting"—one for which the rule was *not* originally designed. *Stringer v. Black*, 503 U.S. 222, 228 (1992). Here, *Teague* barred relief unless the state court acted "unreasonably" in rejecting the rule because "application of [the] old rule in [the new] manner" was "dictated by precedent." *Id.* at 236-37. "Whether the prisoner [sought] the application of an old rule in a novel setting" depended not on whether the rule's application raised a mixed question of law and fact but on whether the rule was specifically designed to resolve the relevant claim:

> *Teague* [only] bear[s] on applications of law to fact which result in the announcement of a new rule. . . . If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, *a rule designed for the specific purpose of evaluating a myriad of factual contexts*, it will be the infrequent

> case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Wright, 505 U.S. at 308-09 (Kennedy, J., concurring) (emphasis added); *see id.* at 304-05 (O'Connor, J., concurring) ("independent evaluation" is required "[i]f a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies"). *Teague* thus was tailored to "refuse[] to give state prisoners the retroactive benefit of new rules . . . [while] not creat[ing] any deferential standard of review with regard to old rules." *Id.* at 303-04.[9]

In three major ways, however, *Teague* fell short of its goal—"that a State . . . not be penalized for relying on 'the constitutional standards that prevailed' " when the state court ruled. *Fretwell*, 506 U.S. at 372. Federal courts continued to nullify state decisions under law that was not in effect or binding when the state court ruled, if the new rule: (1) was created after the state court

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[9] Holding under *Teague* that applying settled mixed-question rules to new facts "is not the stuff of which new law is made," *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 763 (1995) (Kennedy, J. concurring), are *Strickler v. Greene*, 119 S.Ct. ——, 1999 WL 392982, at *13 n.35 (1999) (because Court merely applies *Brady* suppression-of-material-evidence rule to specific facts, but "does not modify *Brady*, we reject [the] contention that we announce a 'new rule' today"); *Bousley v. United States*, 118 S.Ct. 1604, 1609-10 (1998) (*Teague* does not apply, as "claim made here is that petitioner's guilty plea was not knowing and intelligent" and "[t]here is surely nothing new about this principle, enumerated as long ago as [1941]"); *Wright*, 505 U.S. at 294 (no *Teague* bar "because West sought . . . relief under *Jackson v. Virginia*, which was decided . . . before his conviction became final"); *Stringer*, 503 U.S. at 228-29; *Penry v. Lynaugh*, 492 U.S. 302, 314-15 (1989). Post-*Teague* habeas cases conducting de novo review of settled mixed-questions with no hint of a *Teague* problem are, *e.g.*, *Buchanan v. Angelone*, 118 S.Ct. 757, 762-63 (1998) ("reasonable likelihood" that jurors misunderstood an instruction); *Thompson v. Keohane*, 516 U.S. 99, 106-07 (1995) (suspect was "in custody"); *Kyles v. Whitley*, 514 U.S. 419, 441-42 (1995); *Schiro v. Farley*, 510 U.S. 222, 232 (1994).

acted but before *certiorari* review was completed;[10] (2) was adopted by a federal circuit court, whose decisions, unlike this Court's, are not thought to bind state courts;[11] or (3) was within one of *Teague*'s exceptions.[12]

3. *Section 2254(d)'s Rationalization of Habeas Law*

In barring relief unless the state court's "decision was contrary to, or an unreasonable application of, clearly established [Supreme Court] law," § 2254(d) clearly expresses four major changes in the underlying substantive law. The first completes the transformation of the state decision from background prop to the center of habeas attention; the last three finish *Teague*'s work of assuring fidelity to supreme federal law without " 'endu[ing state] jurists with prescience.' " *Lambrix v. Singletary*, 520 U.S. 518, 536 n.5 (1997) (quoting *Stringer*, 503 U.S. at 244 (Souter, J., dissenting)).

First, by making the state "decision" the focus of federal review and dispositive unless erroneous,[13] § 2254(d)

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[10] *See, e.g., Leichman v. Secretary*, 939 F.2d 315, 317 & n.3 (5th Cir. 1991) (petitioner given benefit of *Taylor* rule announced 14 months after direct review, while case was on certiorari); *Rogers v. Lee*, 922 F.2d 836 (4th Cir. 1991) (petitioner given benefit of *Batson* rule announced while his case was on certiorari); *Wilkins v. Bowersox*, 933 F.Supp. 1496, 1526 (W.D. Mo. 1996) (finality on denial of certiorari 22 month after direct appeal).

[11] *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997); Liebman & Hertz, Federal Habeas Corpus Practice and Procedure § 30.2c n.29 (3d ed. 1998) (collecting pre-AEDPA decisions relying on established circuit rules, in absence of governing Supreme Court precedent, to overcome *Teague* bar).

[12] *See* Liebman & Hertz, *supra* note 11, § 25.7 nn.11-12, 26 (collecting decisions granting relief under *Teague* exceptions).

[13] *See Matteo v. Superintendent*, 171 F.3d 877, 885 (3d Cir. 1999) (*en banc*) (§ 2254(d) "firmly establishes the state court decision as the starting point in habeas review"). It is *only* this kind of "deference"—ending relitigation from scratch and giving disposi-

ends relitigation from scratch and the treatment of state decisions as "mere authority." *Second*, by asking whether the state "*decision was*" improper under "clearly established . . . law," § 2254(d) protects state judges whose decisions "were perfectly free from error when made" (*Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring)) from being surprised by law announced during the *certiorari* period. *See Neelley v. Nagle*, 138 F.3d 917, 923 n.3 (11th Cir. 1998). *Third*, by limiting the choice of law on habeas to rules "determined by the Supreme Court," § 2254(d) shields state decisions from nullification by federal circuit precedent in existence, but not binding state judges, when they ruled. *See Sweeney v. Parke*, 113 F.3d 716, 718 (7th Cir. 1997). *Finally*, § 2254(d) has no exceptions. *See Green*, 143 F.3d at 873.

These effects are important. But far from abjuring the Court's habeas reforms, they *perfect* them by more completely locating the state decision at the core of habeas review and realizing *Teague*'s aim of deterring deviations from federal law without commanding clairvoyance about its evolution. This explains why the statute otherwise *codifies Teague* as the Court devised it—as a strict choice-of-law prescription that limits the *rule* to be "appli[ed]" to "clearly established . . . law" in effect when the state "decision" was made but does not impose a new and def-

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tive effect to state court "decisions" *if* they pass muster under the "contrary to" and "unreasonable application" clauses—to which the legislative history refers. *See* H. Conf. Rep. 104-518, 142 Cong. Rec. 3333 (Apr. 15, 1996) (§ 2254(d) "requires deference to the determination of state courts *that are neither* 'contrary to' nor an 'unreasonable application of' clearly established federal law."); 142 Cong. Rec. S3447 (Apr. 17, 1996) (Sen. Hatch) ("[t]he deference . . . just means that we defer to the state courts *if* they have *properly* applied Federal law"; federal courts only cede "the ability to *virtually retry* cases that have been *properly adjudicated* by our State courts") (emphasis added).

erential standard of review of the *result* the state court reached under established law.[14]

B. Properly Read, § 2254(d) Allows Plenary Review of State Decisions That Fail to Follow a Rule of Decision Previously Laid Down by this Court for the Very Issue the State Court Decided

The plain and familiar legal meanings of § 2254(d)'s key phrases, "decision was contrary to . . . law," "clearly established Federal law," and "decision . . . involved an unreasonable application of . . . law," transparently codify the basic *Teague* regime:

"Decision was contrary to law." Under § 2254(d), what is reviewed to see if it "was contrary to law" is the "*decision*." In legal terms, a "decision" is a "conclusion of law upon facts," a "determination arrived at after consideration of the facts and . . . law." In lay terms, it is a "final and definite result of examining a question; a con-

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[14] Section 2254(d)'s supporters assumed that it "codifies and strengthens the deference standard adopted in *Teague*" by "impos[ing the] additional limitation that only decisions by this Court can satisfy the 'clearly established' rule," Brief for Sen. Orrin G. Hatch et al. as Amicus Curiae in *Felker v. Turpin*, 1996 WL 277110, at *24-25 (May 17, 1996), while *preserving* plenary review under settled law. See 142 Cong. Rec. S3446-47 (Apr. 17, 1996) (Sen. Hatch) (§ 2254(d) "essentially gives the Federal courts authority to review, *de novo*, whether the State court decided the claim *in contravention of Federal law*"); 141 Cong. Rec. S7846 (June 7, 1995) (Sen. Hatch) (describing as "absolutely false" Sen. Biden's claim that § 2254(d) requires "defer[ence] to State courts in almost all cases, even if the State is wrong about" established federal law); 142 Cong. Rec. H3602 (Apr. 18, 1996) (Rep. Hyde) ("the Federal judge *always* reviews the State court decision to see if it is *in conformity with established Supreme Court precedents*"). Noting that § 2254(d) "closely emulate[s] *Teague*" without "purport[ing] to limit the federal courts' independent . . . authority with respect to federal questions" are *O'Brien v. Dubois*, 145 F.3d 16, 23 (1st Cir. 1998); *Fern v. Gramley*, 99 F.3d 255, 259-60 (7th Cir. 1996); *see Matteo*, 171 F.3d at 890 (Stapleton, J., concurring); *Neeley*, 138 F.3d at 922; *Zuern v. Tate*, 938 F. Supp. 468, 475 (S.D. Ohio 1996).

clusion" or "resolution."[15] The statute could not be clearer, therefore, that "contrary to law" review applies to mixed-question determinations and bottom-line results.

Nor could it be clearer that review under § 2254(d)'s "decision contrary to law" clause is plenary. "Contrary to" means "in conflict," "inconsistent" or "not in conformity with"; "tending to an opposing course."[16] "Contrary *to law*" means "illegal"; "in violation of . . . legal regulations at a given time." Black's Law Dictionary, at 328. When applied to one court's review of another, "contrary to law" is the legal term of art for plenary review, which courts use to *distinguish* deferential (*e.g.*, "clearly erroneous") review, and which they apply not only to "pure" but also to "mixed" legal questions that "clari[f]y . . . legal doctrine."[17] This reading is compelled in any event by

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[15] Black's Law Dictionary 407, 842 (6th ed. 1990); 4 Oxford English Dictonary 332 (2d ed. 1989); Random House Webster's College Dictionary 344 (1999).

[16] Merriam-Webster Collegiate Dictionary 352 (10th ed. 1993); Webster's New University Unabridged Dictionary 397 (1979); Webster's Ninth New Collegiate Dictionary 285 (1983); Webster's Third New Internat'l Dictionary, Unabridged 495 (1986).

[17] *Salve Regina College v. Russell*, 499 U.S. 225, 232-33 (1991). Under Fed. R. Civ. P. 52(a) and Fed. R. Bank. P. 8013, courts use "contrary to law" to describe their "plenary" review of all judicial determinations other than findings of historical fact reviewed under the "clearly erroneous" standard. *See Flint Elec. Membership Corp. v. Whitworth*, 68 F.3d 1309, 1312 (11th Cir. 1995); *Polyplastics v. Transconex, Inc*, 827 F.2d 859, 860 (1st Cir. 1987); *Palmer v. Shultz*, 815 F.2d 84, 89, 112-13 (D.C. Cir. 1987); *Fairchild v. Lehman*, 814 F.2d 1555, 1557 (Fed. Cir. 1987); *In re Brown*, 743 F.2d 664, 666 (9th Cir. 1984). The Magistrates Act and Civil Rule 72(a) likewise distinguish between an "order [that] is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). "[R]eview under the 'contrary to law' standard is 'plenary,'" requiring "independent judgment" on all legal questions. *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992), *aff'd*, 19 F.3d 1432 (6th Cir. 1994); *see Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993); *Haines v. Liggett Group*, 975 F.2d 81, 91 (3d Cir. 1992), In all four areas, mixed questions elaborating

the settled meaning of the word "law" in the phrase "contrary to law." *See Thompson v. Keohane*, 516 U.S. 99, 111-12 (1995) ("mixed questions of law and fact" are "ranked as issue of law"); *Kansas City S. Ry. v. C.J. Albers Comm'n Co.*, 223 U.S. 573, 591 (1912) (a "mixed question" is "a finding upon questions of fact [that] is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter").

The common sense of the phrase "decision was contrary to clearly established Federal law" yields the same conclusion. For it is when there was "clearly established law" in effect at the time the state court acted—when there was a rule in effect designed for the specific purpose of resolving the relevant claim—that the state court's decision can be tested against that law and said to be "contrary to" law or, conversely, conformable to law. *See O'Brien*, 145 F.3d at 24-25 ("If no Supreme Court precedent is dispositive of a [claim], there is no specific rule to which the state court's decision can be 'contrary.' "). That, indeed, is the precise sense of the identical phrases the *Teague* cases use to describe their "de novo review of *mixed* questions" that arise in deciding whether state decisions were "*contrary to*" (*Butler v. McKellar*, 494 U.S. 407, 414 (1990)) or "*contravene well-considered precedents*," or, conversely, whether they "*conformed to rules then existing*," *Wright*, 505 U.S. at 307 (Kennedy, J., concurring); *Saffle v. Parks*, 494 U.S. 484, 486 (1990); "*comply with the federal law in existence* at the time," or "*comport with the federal law* [*then*] *established*," *Sawyer v. Smith*, 497 U.S. 227, 234, 239 (1990); were " '*consistent with established constitutional standards*' " or

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legal meaning receive "plenary" review. *See, e.g., Salve Regina College*, 499 U.S. at 232-33; *Pullman-Standard v. Swint*, 456 U.S. 273, 289 & n.19 (1982); *ATACS Corp. v. Trans World Commun.*, 155 F.3d 659, 665 (3d Cir. 1998); *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056, 1061 (8th Cir. 1996).

" 'rest[] upon *correct application of the law in effect* at the time,' " *Teague*, 489 U.S. at 306-07 (emphasis added).

"Clearly established Federal law." The clincher is the "established . . . law" phrase itself, which the *Teague* cases use to mean the "old rules" under which habeas review of pure *and mixed* questions is plenary. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 167-69 (1996) (plenary review only under "a *well-established rule*" or "*well established* right"); *Stringer*, 503 U.S. at 231 (plenary review under a "*well-established requirement*") (emphasis added).[18] Language " 'transplanted from another legal source . . . brings the old soil with it,' " obliging courts to give the adopted phrase "its clearly accepted meaning." *Evans v. United States*, 504 U.S. 255, 260 & n.3 (1992); *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98 (1991). The accepted meaning of the "old rule"—the "clearly established law"—as to which *Teague* "g[a]ve prisoners the retroactive benefit . . . but did not create any deferential standard of review" (*Wright*, 505 U.S. at 304 (O'Connor, J., concurring)), serves in § 2254(d) to define the old or established rule to which a state decision *can be* "contrary." This refers to a preexisting rule *designed for the specific purpose of evaluating the relevant claim*, including "a rule of . . . general application . . . designed for the specific purpose of evaluating a myriad of factual contexts." *Id.* at 309 (Kennedy, J., concurring). *See id.* at 304 (O'Connor, J., concurring).

"Decision involved an unreasonable application of law." What review is required, though, when at the time the

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[18] *See also Goeke v. Branch*, 514 U.S. 115, 118 (1995); *Wright*, 505 U.S. at 304 (O'Connor, J., concurring); *Sawyer*, 497 U.S. at 239; *Penry*, 492 U.S. at 314. Many pre-AEDPA lower court cases use "clearly establish" to describe rules that are "old" for *Teague* purposes, triggering plenary review. *See, e.g., Dawson v. United States*, 77 F.3d 180, 183-84 (7th Cir. 1996); *Walter v. United States*, 969 F.2d 814, 818 (9th Cir. 1992).

state court acted, there was *no* rule for resolving the claim to which its "decision" could be "contrary?" What if the "propositions [then] established were [only] the 'givens' from which any [rule] had to be derived, [but] . . . were not 'controlling authority' in the sense" that "a state court considering [the prisoner's] claim at the time his conviction became final would have felt compelled . . . to conclude that the rule [he] seeks was required by the Constitution?" *Lambrix*, 520 U.S. at 527, 529 n.3. Again, § 2254(d)'s answer is *Teague*'s: The habeas court must ask whether the state "decision involved an unreasonable application of clearly established law."

Notably, the diction here switches from asking what "the decision *was*" to what it "*involved*," *i.e.*, to what it "contain[ed] as a part" or "feature," or "include[d] in its operation." [19] Plainly denoted is a switch from review of the state-court decision itself—the application of law to fact to reach a result, *see* pp. 33-34 *supra*—to review of only a part or feature of the decision.

As plainly, the feature to be reviewed is the "unreasonable[ness]" *vel non* of the decision's "application of clearly established Federal law." *And that feature—a decision's reasonable or unreasonable application of law—is in terms the one that, in the same situation, drives the outcome under* Teague. Thus, if no governing rule was available when the state court acted, because "established" law at the time merely provided " 'givens' " from which a rule "had to be derived," *Teague* required habeas courts to ask whether the rule the state court derived "from precedent *is not reasonable*," *Wright*, 505 U.S. at 304 (O'Connor, J., concurring), or was an "*unreasonable application of these principles*," *Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring), or an "*illogical or . . . grudging application of*" precedent, *Wright*, 505

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[19] The American Heritage Dictionary 950 (3d ed. 1992); Oxford American Dictionary 349 (1980).

U.S. at 312 (Souter, J., concurring)—or, conversely, whether the rule involved in the state decision was a "*reasonable application*[] *of then-existing law*," *Thompson*, 516 U.S. at 119 n.1 (Thomas, J., dissenting), a "*reasonable reading*" of that law, *Stringer*, 503 U.S. at 247 (Souter, J., dissenting), or "a *reasonable interpretation*" of "decisions of this Court [which] *clearly establish*" relevant principles, *Caspari*, 510 U.S. at 392, 396-97 (1994).

"[W]here Congress borrows terms of art," it also "adopts the cluster of ideas . . . attached" to the terms, evincing "satisfaction with widely accepted definitions, not a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952). By codifying *Teague*'s "unreasonable application of clearly established law" concept, § 2254(d) plainly provides that when a state court was forced to derive a rule by applying propositions established by preexisting law which were relevant but not controlling, review on habeas is limited to whether the application of those propositions to derive a rule was reasonable. *See O'Brien*, 145 F.3d at 24-25. "Reasonableness, in this as in many other contexts, is an objective standard"; the issue is whether the state court "acted objectively unreasonably." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997); *Stringer*, 503 U.S. at 237.

The sum and substance of § 2254(d), then, is unmistakable when its language is read with any care in the light of its origins. By codifying *Teague*'s black-letter terms, § 2254(d) requires

1) plenary "contrary to" law review (*Butler*, 494 U.S. at 414) under " 'well-established constitutional principle' " (*Penry*, 492 U.S. at 314) if Supreme Court law had specifically designed a rule for the claim when the state court acted (*see Wright*, 505 U.S. at 309 (Kennedy, J., concurring)), but
2) review only for an "unreasonable application" of existing precedent (*Gilmore*, 508 U.S. at 351

(O'Connor, J., concurring)) when the state court acted in the absence of prescribed law.[20]

"Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 119 S.Ct. 1215, 1220 (1999). That tenet is conclusive when Congress conversely makes a point of taking "familiar legal expressions in their familiar legal sense" *from* "the underlying substantive law." *Henry*, 251 U.S. at 395; *Keene*, 508 U.S. at 209. And that, as we have shown, is exactly what § 2254(d) does with the key terms embodying the *Teague* doctrine. So, with the important exceptions noted (which themselves bring to full maturation the "supremacy without pre-science" seeds that *Teague* originally planted), § 2254(d)'s plain and established legal terms manifestly codify the *Teague* doctrine calling for plenary review of state-court decisions that are challenged on federal habeas as departures from the rules of constitutional law previously announced by this Court to govern that kind of decision.

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[20] *See O'Brien*, 145 F.3d at 24-25 (when "Supreme Court has prescribed a rule that governs the petitioner's claim"—including when its "holdings . . . erect a framework specifically intended for application to variant factual situations"—"habeas court gauges whether the state court decision is 'contrary to' the governing rule"; but when "there is no specific rule to which the state court's decision can be 'contrary,'" federal court asks "whether the state court's derivation of [its own] rule from the Court's generally relevant jurisprudence appears objectively reasonable"), *followed by Matteo*, 171 F.3d at 888-90. Applying this approach, the First, Second, Third, Ninth and Tenth Circuits have held that § 2254(d) requires plenary, "contrary to" review of claims under, e.g., the established, factually inclusive *Strickland* rule for ineffective assistance claims and the *Waller v. Georgia*, 467 U.S. 39 (1984), rule for open-trial claims. *See Matteo*, 171 F.3d at 899-900 (Becker, C.J., concurring in the judgment) (discussing majority opinion); *Canales v. Roe*, 151 F.3d 1226, 1229 n.2 (9th Cir. 1998); *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998); *O'Brien*, 145 F.3d at 25 n.6; *Ayala v. Speckard*, 89 F.3d 91, 97 (2d Cir. 1996).

C. The Fourth Circuit Misread § 2254(d)

The First and Third Circuits embrace the above interpretation, with support from the Second, Ninth and Tenth. *See* note 20 *supra*. The Fourth Circuit, with support from the Fifth, Seventh and Eleventh, reads the statute to bar habeas relief in all but the rarest of cases. As we now demonstrate, the Fourth Circuit's reading tramples essential canons of construction.

To get the Fourth Circuit's reading in perspective, it is important to note that its point of departure (*see Green*, 143 F.3d at 869-73) was the Fifth and Seventh Circuits' reading, which puts only "pure law" questions in the plenary "contrary to" category of review, puts "mixed questions" in the "unreasonable application" category, and makes the latter review extremely deferential: "[A]n application of law to facts is unreasonable only when . . . reasonable jurists considering the question would be of *one view* that the state court ruling was incorrect"; if a majority and dissent disagree on a decision's correctness, that makes the decision reasonable.[21] Acknowledging that "the statute . . . makes no distinction at all between" the articulation "of a legal principle . . . and the application of such a principle to a particular set of facts," the Fourth Circuit made a single change in the Fifth-and-Seventh Circuit approach, then adopted the rest wholesale. *Id.* at 872. The one change was to give plenary, "contrary to" review to a state court's "application of law to facts *indistinguishable in any material way* from those on the basis of which the [Supreme Court] precedent was decided." *Id.* at 870 (emphasis added). Except in cases that are factually indistinguishable from one decided earlier by this Court, the "unreasonable application" clause

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[21] *Drinkard v. Johnson*, 97 F.3d 751, 768-69 (5th Cir. 1996) (emphasis added); *see Lindh v. Murphy*, 96 F.3d 856, 870, 876-77 (7th Cir. 1996) (*en banc*), *rev'd on other grounds*, 521 U.S. 320 (1997).

becomes the whole measure of review, and relief becomes available "only when the state courts have [acted] . . . in a manner that reasonable jurists would *all* agree is unreasonable." *Id.* (emphasis added).

As we have shown above, the Fifth-and-Seventh-Circuit approach confining the "contrary to law" clause to "pure" legal questions and assigning "mixed" questions to the "unreasonable application" clause is indefensible as a matter of statutory construction. Among other insuperable difficulties,[22] this reading of § 2254(d) leaves the

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[22] *See Nevers v. Killinger*, 169 F.3d 352, 359 (6th Cir. 1999) (pure-mixed division "engrafts into the statute words—'questions of law,' and 'mixed questions of law and fact'—which Congress did not place there"). Worse, § 2254(d)'s language *replaced* the House's earlier version of § 2254(d), which *did* distinguish the state court's "*interpretation* of clearly established Federal law" from its "application *to the facts* of clearly established Federal law," 141 Cong. Rec. H1424 (Feb. 8, 1995), making it "unseemly—and wrong" for the Fifth and Seventh Circuits to "scavenge discarded language from the legislative scrap heap and graft [it] onto the version of the bill that Congress ultimately enacted." *O'Brien*, 145 F.3d at 22 (reviewing § 2254(d)'s drafting history). The pure-mixed distinction also ignores the clear terms that *replaced* the rejected ones, which clearly denote plenary review of pure and mixed conclusions made when there was law to which the result could be "contrary," and "unreasonable application" review of rules derived from relevant law in the absence of controlling law. *See* pp. 33-39 *supra*. The obvious terminology to use, if Congress meant to call for deferential review of mixed-question decisions—or, more generally, of that state-court decision or result—rather than of the rule the state decision involved, is the terminology of the rejected House version—"decision was . . . [an] unreasonable application *to the facts* of . . . law," 141 Cong. Rec. H1424, *see United States v. Gaudin*, 515 U.S. 506, 512 (1995) (an "application-of-legal-standard-*to-fact* sort of question [is] commonly called a 'mixed question of law and fact' "); *Thompson*, 516 U.S. at 112-13 ("application of the controlling legal standard *to the historical facts* . . . presents a 'mixed question' ") (emphasis added)—or those of an abutting section of AEDPA, § 2254(e)(1): that the legal or mixed "determination . . . by a State court shall be presumed to be correct." Asking whether "the *decision was contrary to law*" or "*involved* an unreasonable *application of law*" is quite different.

"contrary to" clause a cipher, with *no* cases to decide. To begin with, only "pure law" questions posed by *settled* law qualify, 143 F.3d at 871, and such questions admittedly arise only when something that almost never happens, happens: when a state court misquotes this Court's rule. *See Lindh*, 96 F.3d at 877 ("contrary to" never applies if state court "correctly states the holdings" of this Court's cases). And if it *did* happen, a mere mis*statement* of law could not itself be a sufficient basis for habeas relief, since a federal court's "power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). Yet, when it comes to reviewing the judgment or decision—the application of law to fact to reach a result—the pure-mixed approach deploys *that* review to the "unreasonable application" clause. This Court has been "reluctant to adopt a construction [of one AEDPA provision] making another . . . provision superfluous," *Hohn*, 118 S.Ct. at 1976; yet a pure-mixed approach does just that.[23]

And the Fourth Circuit approach, although nominally different, is not factually or logically so. What it does is to add to the empty category of "pure law" cases arising under settled law an equally illusory class of "mixed" cases: cases that are identical in all ways to a previously decided Supreme Court case. 143 F.3d at 871-72. Of course, these "easiest cases don't even arise." *United States v. Lanier*, 520 U.S. 259, 271 (1997); *see Lindh*, 96 F.3d

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[23] A *Teague*-informed reading assigns numerous cases to each clause. *See, e.g., Strickler, Buchanan, Schiro, supra* note 9 (plenary "contrary to" review; relief denied); *Thompson, Kyles, Penry, supra* note 9 (same review; relief granted); *O'Dell, Lambrix, Gray, Caspari, Gilmore, Sawyer, Saffle, Butler, Teague, supra* ("unreasonable application" review; relief denied); and *Tuggle v. Netherland*, 516 U.S. 10, 13-14 (1995) (*per curiam*); *Stansbury v. California*, 511 U.S. 318, 322-26 (1994); *Stringer*, 503 U.S. at 230-32 (relief granted under rules Court had never before articulated but that its prior caselaw made it unreasonable for state courts to reject).

at 878 (Wood, J., dissenting) ("it is rare indeed that we will see something identical in all particulars to a case already decided by the Supreme Court"). Moreover, there is not a jot of support in § 2254(d) for limiting "contrary to" review to cases identical to a Supreme Court decision. Everything points the other way. The "decision" —the thing under review—is *all* results from applying law to fact. "Contrary to law" means *any* inconsistency with or "violation of the law at a given time"—including law evolved by fact-grounded adjudication in the common-law manner—and is *not* limited to any archetype of illegality. Questions of "law" include mixed questions. "Clearly established law" is something the Court often makes without deciding the very case. *See Lanier*, 520 U.S. at 268-72 (giving many examples). *Most* to the point, the words "decision contrary to clearly established law" codify the *Teague* formulation for plenary review under *every* type of old rule, including "a rule designed for the specific purpose of evaluating a *myriad* of factual contexts." *Wright*, 505 U.S. at 309 (Kennedy, J., concurring) (emphasis added).

The Fourth Circuit did not even purport to get its "identical case" test from the statute. Instead, it thought the "difficult[y]" of defining the statute's "overlapping" and "not . . . clear" words gave it license to *remake* the text pursuant to an alleged "plain purpose of the statute" that it neither defined nor defended but simply assumed was to shut the door tight on the writ. 143 F.3d at 869-70. Such is not acceptable interpretation. *See West Virginia*, 499 U.S. at 98 ("The best evidence of . . . purpose is the statutory text."). The most disturbing aspect of the Fourth Circuit's variation on the pure-mixed theme is its unrestrained impulse to scrap "the underlying substantive law," though every *Teague*-derived term of § 2254(d) and every interpretive tenet says to conserve it. *Keene*, 508 U.S. at 209. The court turns statutory construction on its

head, first conceding that "§ 2254(d) imports an anti-retroactivity principle into federal habeas law by requiring a habeas petitioner to demonstrate that the state court's resolution of his claim was inconsistent with federal law that was clearly established at the time his conviction became final," but then, inexplicably, "declin[ing] to interpret" the provision "as . . . codfy[ing]" any part of "the *existing* non-retroactivity doctrine of *Teague*." 143 F.3d at 873-74 (emphasis added).[24]

Equally infirm is the Fourth Circuit's self-nullifying definition of an "unreasonable application" as a ruling "reasonable jurists would *all* agree is unreasonable." *Id.* at 870 (emphasis added). Treating a ruling's existence as decisive proof of its "reasonableness" is neither logical, *see Matteo*, 171 F.3d at 889-90, nor consistent with the background habeas doctrine that reasonableness is " 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule" is reasonable, *Wright*, 505 U.S. at 304 (O'Connor, J., concurring).

Finally, the Fourth Circuit's reading breaks the "cardinal principle" that "if a serious doubt of constitutionality is raised, . . . [a] court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The Fourth Circuit's reading "portends" at least "a serious constitutional conflict" by requiring Article III judges to give force and effect to state decisions that they are statutorily obliged to review and that, in their independent judgment, violated the supreme and established law of the land when made. *O'Brien*, 145 F.3d at 21-22.

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[24] *See also Drinkard*, 97 F.3d at 767 n.8 ("We will not complicate the task of statutory interpretation before us by turning first to the murkiness that is *Teague* retroactivity doctrine to determine whether the language of the statute somehow parallels Supreme Court precedent in this area.").

> [W]e have [never] held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.

Wright, 505 U.S. at 305 (O'Connor, J., concurring).[25]

Denying the federal courts the power to make their own decisions on issues of constitutional law that come before them and to embody those decisions in effectual judgments would defeat "the essential constitutional role

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[25] Congress often withholds federal jurisdiction to review state decisions. And it often forbids litigants to use general jurisdictional grants as a subterfuge to obtain review of state decisions that it has specifically withheld. *See* Full Faith and Credit Act, 28 U.S.C. § 1738; Anti-Injunction Act, *id.* § 2283; *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) (all barring disappointed state-court litigants—"merely [as] an attempt to get rid of [an unappealable state] judgment," *id.* at 416—from bringing a federal action claiming that the unappealable state judgment violated federal law). *Cf. Keeney*, 504 U.S. at 20 (O'Connor, J. dissenting); *McFarland v. Scott*, 512 U.S. 849, 858 (1994) (if statute, *e.g.*, on habeas, specifically *grants* jurisdiction to review state decisions, Full Faith and Anti-Injunction Acts do not apply). Likewise, federal courts resist review that the "case or controversy" limit might bar—as when federal courts decline to "advise" state courts that their decisions misstate federal law in ways that do not affect an outcome resting on an adequate state ground, *Herb*, 324 U.S. at 126, or because the error of federal law was probably harmless, *see, e.g., O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). And, via *Teague*—and § 2254(d), properly read—federal courts may refuse to apply "later emerging legal doctrine" to reverse state decisions that were "valid when entered." *Sawyer*, 497 U.S. at 234. But what Congress and the Court have *never* done is order Article III courts having jurisdiction to review state decisions to give effect to those decisions that, in their independent judgment, violated supreme law when made. "Congress may be free to establish a . . . scheme that operates without court participation" but may not "instruct[] a court automatically to enter a judgment pursuant to a decision that the court has no authority to evaluate." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995).

of the judiciary"—"the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law." *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (*en banc*) (Kennedy, J.). "The judicial Power" created by Article III includes three capacities that the Fourth Circuit reading of § 2254(d) derogates: (1) to decide every aspect of a case affecting the meaning of supreme law; (2) to do so independently, without deference to anyone save a higher federal court; and (3) to grant relief sufficient to effectuate the court's legal judgment and neutralize state statutory or decisional law in conflict with supreme law. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 176-78 (1803) (Congress may not force Article III courts: to "close their eyes on the constitution, and see only the law"; to defer to Congress' reading of the Constitution; or to give effect to law found unconstitutional). The cases declaring these principles, which Congress can hardly be assumed to have disregarded or intended to confront by enacting § 2254(d), are legion.[26]

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[26] *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-44, 358-59 (1816) (once given jurisdiction to construe a federal treaty, Court may not be limited to the "mere abstract construction of the treaty itself"; rather, "every error that immediately respects that question *must* . . . be within the cognizance of the court," including the treaty's application to the facts; nor may Court defer to a state court on a legal question on which the two courts disagree, or let the state court secure the same result by exerting a power to reject the Court's decisions on close questions; Court must have a power to make its judgment effective against the parties); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (rejecting Virginia's request that Court defer to state court on "doubtful" question of federal law: "With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us"); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 819-23 (1824) (a federal court's power to review a state court decision must include a power to review factfindings decisive of federal rights: if "the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of

These cases belie the Fourth Circuit's answer to the obvious constitutional objections to its reading—that because "we are free, if we choose, to decide whether a habeas petitioner's conviction and sentence violate any constitutional rights," Congress in the guise of " 'regulating relief' " may forbid *all* relief and force Article III judges to give effect to legal decisions that in their judgment violated established federal law when made. *Green*, 143 F.2d

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cases only which present the particular question involving the construction of the constitution," then "words obviously intended to secure . . . rights under the constitution . . . will be restricted to the insecure remedy of an appeal, upon an insulated point, after it has received that shape which may be given to it by another tribunal"); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 517, 522-23 (1858) (state court may not, by granting habeas writ freeing a federal convict, "reverse[] and annul[] the judgment of the District Court of the United States"; federal court must have power sufficiently "paramount in authority to carry" its view of supreme law "into execution"); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145-47 (1871) (Congress may not order a federal court to ignore evidence presenting a constitutional issue; to apply a "conclusive presumption" "giv[ing the evidence] an effect precisely contrary" to that "which, in its own judgment, such evidence should have" under federal law; or to surrender jurisdiction *or the power to order relief* if—after being given "jurisdiction . . . to a given point"—it finds a federal violation); *Gordon v. United States*, 117 U.S. 697, 698-99, 702 (1864) (Congress may not deprive an Article III court with jurisdiction of the power to order relief, else its judgment would be merely advisory); *Crowell v. Benson*, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power . . . necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."); *Norris v. Alabama*, 294 U.S. 587, 590 (1935) (an Article III court may *not* defer to a state criminal court's decision of a mixed constitutional question); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (Congress may not deny federal judgments effect because Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior [Article III] courts"—*i.e.*, the power "to render dispositive judgments"). *See generally* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696 (1998).

at 875. From *Marbury* and *United States v. Klein*, to *Plaut v. Spendthrift Farm, Inc.*, the Court has held that the judicial power requires more than "merely" an ability to issue "an opinion, which would remain a dead letter, and without any operation upon the parties." *Gordon*, 117 U.S. at 702. It requires, instead a "*Power*": an ability to enforce the court's opinion through a remedy sufficient to make binding its conclusion about the demands of supreme law.[27] This is especially so when relief is needed to neutralize a state court's decision of *law* that is found to contravene the Constitution when it was made. Otherwise Article III courts would be required to flout the Supremacy Clause by letting state courts make law in conflict with supreme law.

A court's duty is to adopt any "fairly possible" construction of a statute by which serious "constitutional questions may be avoided." *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). The Fourth Circuit has *maximized* constitutional doubt by adopting the textually *weakest* reading. Its reading must be rejected.

D. Under § 2254(d), the Virginia Supreme Court Decision in Terry Williams' Case Was Contrary to, and an Unreasonable Application of, Clearly Established Supreme Court Law

Strickland's 1984 test for determining the prejudice required to support a claim of ineffective assistance of counsel was the controlling legal standard when the Virginia Supreme Court decided Williams' case in 1997. Such a standard is the classic "rule of . . . general appli-

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[27] *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366 (1953) (Congress may select among remedies, but "denial of *any* remedy" is constitutionally suspect); Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 87-88 (1981) (an "objection to legislation that . . . deprives [federal courts] of jurisdiction to provide effective relief" is "at the very heart of . . . *Klein*").

cation . . . designed for the specific purpose of evaluating a myriad of factual contexts." *Wright*, 505 U.S. at 309 (Kennedy, J., concurring); *see Strickland*, 466 U.S. at 698; *and see* note 20 *supra*. Moreover, because Williams' claim arose in *Strickland*'s exact setting—a lawyer's failure to develop and present available mitigating evidence at a capital-sentencing trial—the facts of Williams' case "do[] not change the force with which [*Strickland*'s] principle applies." *Wright*, 505 U.S. at 304 (O'Connor, J., concurring).

Strickland thus provides "clearly established Federal law, as determined by the Supreme Court" to which the Virginia court's "decision" can be "contrary." And as we have demonstrated, that decision manifestly *was* contrary to *Strickland*. *See* pp. 11-16 *supra*. Indeed, by reading *Fretwell* as a general gloss on *Strickland* that converted *Strickland*'s clearly-stated probabilistic standard into an impressionistic inquiry into "fundamental fairness," the Virginia Supreme Court not only rendered a decision "contrary to" *Strickland*, but one that *displaces Strickland* as the law of the federal Sixth Amendment in Virginia. *See* pp. 17-22 *supra*.

In any event, on the facts of Williams' case, the Virginia court's decision that he would receive a "windfall" under *Fretwell* if he were given a new sentencing hearing with a competent lawyer to present the substantial mitigating evidence neglected at his original trial is *also* an "unreasonable application" of *Fretwell* itself. It cannot be immunized from correction, as the Fourth Circuit did, on the theory that a state-court decision can be found "unreasonable" only when it " 'decided the question [presented] by interpreting or applying the relevant precedent in a manner that reasonable jurists would *all* agree is unreasonable.' " (JA 498) (emphasis added). This would be akin to saying that the question whether the temperature in a building is "intolerable" must be determined,

not by asking whether anybody in the building can survive it, but by asking whether anybody in the building can imagine that anybody else might. Interposing *two* layers of insulation between reason and the Constitution is the kind of "far-reaching and seemingly perverse" action that should not be attributed to AEDPA with no support for it in the statute's text. *Stewart*, 118 S.Ct. at 1621.

CONCLUSION

Terry Williams is entitled to relief under both clauses of 28 U.S.C. § 2254(d)(1). The judgment below should be reversed with directions to vacate his death sentence.

Respectfully submitted,

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